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626920—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 644

GEORGE CASEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 4c–5c) [1] is reported at 295 F. 2d 470.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1961 (R. 3c). A petition for rehearing was denied on December 4, 1961 (R. 6c). The petition for a writ of certiorari was filed on December 30,

[1] The certified record consists of the petitioner's appendix in the court of appeals, cited with the suffix "a"; the government's appendix below, cited with the suffix "b"; a copy of the petition for rehearing below; and the proceedings of the court of appeals, cited with the suffix "c." Petitioner has also filed a "Supplemental Appendix" in this Court which is designated with the suffix "sa."

1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner can raise for the first time in this Court a question regarding an alleged unlawful search, after foreclosing the opportunity to develop the facts at the trial by his decision not to move to suppress the evidence.

2. Whether the admission of one answer by a government witness, not objected to at trial and not in itself clearly prejudicial, was such plain error as to require a new trial.

3. Whether the trial judge's addressing government counsel by his first name amounted to partiality which prejudiced petitioner.

4. Whether the explanation by the trial judge to the jury of the reason for the dismissal of a co-defendant, to which petitioner did not object, so prejudiced petitioner that he is entitled to a new trial.

STATEMENT

Petitioner and others were convicted by a jury in the Eastern District of Michigan on a one-count indictment which charged a conspiracy to violate the narcotics laws relative to marihuana, in violation of Section 2 of the Narcotics Drugs Import and Export Act, as amended (21 U.S.C. 176a) (R. 3a–4a). Petitioner was sentenced as a second offender to the minimum mandatory penalty of ten years' imprisonment (R. 38a). The court of appeals affirmed *per curiam* (R. 4c–5c).

No question is raised regarding the sufficiency of the evidence, which may be briefly summarized:

Customs agents reported that a large quantity of marihuana would be brought into the United States from Mexico in two specifically described automobiles (R. 1b). After the two automobiles were observed, they were followed through parts of Texas (R. 2b). Four footlockers from the cars were checked at a bus station. The agents kept the footlockers under surveillance until they were delivered in Detroit (R. 3b). These footlockers were subsequently claimed and taken to be loaded on a truck. At this point the customs agents arrested the participants and seized the footlockers, which contained marihuana (R. 4b–6b). Petitioner Casey had told the truck driver to pick them up and take them to 6018 Crane Street (R. 6b–7b). Petitioner was arrested as he ran out the back door at that address (R. 8b).

ARGUMENT

1. Petitioner alleges in this Court, for the first time, that illegal searches were made.[2] The question was not presented to the court of appeals by brief or by petition for rehearing. Petitioner has filed in this Court a Supplemental Appendix which indicates trial testimony: (1) that an agent had opened the back door of a car and picked up some footlockers noting that they were heavy (R. 4sa); and (2) that at some

[2] Petitioner does not claim that any evidence was seized during the alleged illegal searches.

point, while the footlockers were being transported by bus and under surveillance, an agent examined "the contents of one of the suitcases" and found a "green weedy substance which appeared to be marihuana" (R. 5sa).

Petitioner made no objection to this testimony at his trial; he made no motion for suppression of evidence on this ground either before or during trial; and he made no suggestion to the district court that he was aggrieved. Therefore, no opportunity was presented to the district judge to receive any evidence on this claim. See Rule 41, F.R. Crim. P. Circuit Judge Martin, who presided at the trial, was careful to consider all legal questions presented (see, for example, his ruling on the admissibility of certain statements (R. 8a–10a)). If any suggestion of illegality had been made, all the facts as to the basis of the custom agents' actions and petitioner's standing to raise the issue could have been developed. There may well have been strategic reasons why petitioner did not wish to claim at the trial that he was aggrieved by the search. Petitioner cannot keep quiet, and thus foreclose inquiry into all the circumstances, both as to the authority and reasonableness of the search and his standing to raise the issue, and then present the question for the first time in this Court.

2. Petitioner likewise did not raise his other three contentions, which he argued in the court of appeals, in the district court. Therefore, they could be raised in the court of appeals and this Court only if

they were "[p]lain errors or defects affecting substantial rights." Rule 52(b), F.R. Crim. P. We submit, on the contrary, that all three claims are clearly without merit.

a. On redirect examination, the government asked a customs agent (R. 15a):

> Q. Did you have any particular reason to follow Mr. Casey on the 12th of March of this year?
>
> A. No, sir, we knew where the marihuana was going to be.

Petitioner claims (Pet. 9) that this answer "injects flagrantly prejudicial testimony which implies personal knowledge which is legally suppressed by the technical rules of evidence." We submit, however, that, in context, the answer was not prejudicial. It was properly subject to the interpretation that surveillance of the marihuana rather than of petitioner was the best lead, or that the agent knew that the shipment was going to Detroit so there was no need to follow any person. No objection or motion to strike the answer was made, indicating the defense counsel's estimate that it was not prejudicial. But, even if the statement were prejudicial and therefore should have been excluded, petitioner's failure to raise the issue before the trial court is conclusive. Certainly, this single statement was not so clearly inadmissible and so seriously prejudicial that it falls within that exceptional category of cases where a new trial is required because of inadmissible testimony even though no objection was made.

b. Petitioner contends (Pet. 5) that the trial judge showed partiality to the government by repeatedly calling government counsel by his first name and by complimenting his skill. However, not only the trial judge called government counsel by his first name; defense counsel did also (R. 34a, 9b). The trial judge also called a defendant (who was dismissed) by his first name (R. 13a) and addressed Copening, the bailiff, as "Cope" (R. 12a, 28a). Nor were all the trial judge's remarks complimentary of the government attorney's skill. The trial judge told the government counsel that he was working his witness overtime (R. 7a); that perhaps a statement should not be introduced because of *McNabb* problems (R. 8a); that he should save time (R. 11a); and that the government counsel was asking an "unnecessary" question (R. 14a). The record does not show partiality at all, much less prejudicial partiality.

c. When the government conceded that it could not support a conviction of co-conspirator Martinez on the record as made, the trial judge sustained a motion to dismiss (R. 11a–12a). The court explained to the jury that Martinez was dismissed "because there was not sufficient evidence in this trial introduced to tie him into this alleged conspiracy" (R. 12a). There was a further discussion about sending him back to Mexico, because he was a citizen of Mexico (R. 13a). We see nothing prejudicial in these latter remarks, which were merely superfluous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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